IN THE

Supreme Court of the United States

October Term, 1961

No. 35

THE COUNTY OF LOS ANGELES and the CITY OF LOS ANGELES,
Petitioners,

vs.

SCANDINAVIAN AIRLINES SYSTEM, INC., a New York corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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SCANDINAVIAN AIRLINES SYSTEM, INC., a New York corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioners, the County of Los Angeles and the City of Los Angeles, respectfully pray for Writ of Certiorari to the Supreme Court of the State of California to review the judgment thereof holding that foreign owned and based aircraft making regular, recurring entries into the State in foreign commerce are constitutionally immune from State ad valorem property taxation apportioned and allocated in accord with the benefits, opportunities and protections afforded such property by the States.

Opinions Below

This case was tried on the pleadings. The trial court, the Superior Court of California for the County of Los Angeles, without written opinion overruled petitioners' general demurrer to respondent's second amended complaint. The material facts alleged in said complaint were by stipulation of the parties admitted to be true, and judgment was entered for respondent.

The intermediate California appellate court, the California District Court of Appeal, Second District, Division Two, rendered a written opinion holding the subject tax valid. Said opinion is unreported in the official California reports but is reported in 6 *California Reporter* 694 (West Pub. Co.) and is set out hereinafter in Appendix B.

There are three separate opinions by members of the California Supreme Court. The opinion of the majority, by Associate Justice Peters, is reported 56 Adv. Cal. 1-32, 363 P. 2d 25-44, and is hereinafter set out in Appendix A 1-47; a separate concurring opinion of Associate Justice Dooling is reported 56 Adv. Cal. 32, 363 P. 2d 44, and hereinafter set out in Appendix A at 47-48; the dissenting opinion of Associate Justice Traynor (concurred in by Chief Justice Gibson) which would hold the instant tax valid is reported 56 Adv. Cal. 32-38, 363 P. 2d 44-48, and hereinafter set out in Appendix A at 48-58.

The judgment of the California Supreme Court, the court below, in conformance with that court's practice is the final paragraph of the majority opinion: "The judgment [of the trial court holding the instant tax invalid] is affirmed." 56 Adv. Cal. at 32, 363 P. 2d at 44, App. A at 47.

Grounds Upon Which Jurisdiction of this Court Is Invoked

1. The judgment of the California Supreme Court here sought to be reviewed was rendered and entered on May 29, 1961.[1]

2. The statutory provisions which confer jurisdiction to review the judgment in question by Writ of Certiorari are 28 U.S.C., Secs. 1257 (3) and 2101.

Questions Presented for Review

1. Whether or not the Commerce Clause and the Tonnage Clause (Art. I, Sec. 8, Cl. 3 and Art. I, Sec. 10, Cl. 3, *United States Constitution*) prohibit the States from laying upon foreign-owned and foreign-based aircraft flying regularly in foreign commerce an ad valorem property tax measured by and apportioned according to the time said aircraft are physically within said States.

[1]The opinion of May 29, 1961 was modified by the California Supreme Court on June 21, 1961 (56 Adv. Cal. 93). Reference throughout is only to the modified opinion.

2. Whether or not the "Convention and Protocol between the United States of America and Sweden" (54 Stat. 1759, Treaty Series No. 958) exempts from State ad valorem property taxation aircraft owned by Swedish nationals, which make regular, recurring commercial entries into the States.

3. Whether or not, when the United States by treaty provides for exemption from State ad valorem taxation of aircraft, owned by nationals of Sweden and therein based, the implication against discriminatory State taxation contained in the Commerce Clause, *United States Constitution,* prohibits the States from so taxing all other foreign owned and based aircraft making regular, recurring commercial entries into the States.

Constitutional Provisions, Treaties and Statutes Involved

The California Supreme Court premised its decision herein upon the Commerce (Art. I, Sec. 8, Cl. 3) and Tonnage Clauses (Art. I, Sec. 10, Cl. 3) of the *United States Constitution,* and upon Articles I and XIII of the *Convention and Protocol between the United States of America and Sweden,* dated March 23, 1939, effective January 1, 1940 (54 Stat. 1759, T.S. No. 958).[2] Respondent airline also depends upon the Due Process

[2]Said treaty is reproduced herein in its entirety as Appendix C.

Clause of the Fourteenth Amendment as one of its asserted grounds for invalidity of the subject tax. (See respondent's complaint, par. X, R. Cl. Tr. 6.)

Petitioners levied the subject tax pursuant to the general authority granted by the following constitutional and statutory provisions of California law:

> *California Constitution*, Article XIII, Sec. 1:
>
> "All property in the State . . . not exempt under the laws of the United States shall be taxed in proportion to its value . . ."
>
> *California Constitution*, Article XIII, Sec. 10:
>
> "All property . . . shall be assessed in the County, City and County, town or township or district in which it is situated . . ."
>
> *California Revenue and Taxation Code*, Sec. 201:
>
> "All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this Code."

The California Courts have previously held that these provisions of California law empower the State of California and its subdivisions to levy apportioned ad valorem property taxes upon aircraft used as instrumentalities of interstate and foreign commerce. *Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958); *Slick Airways v. County of Los Angeles*, 140 Cal. App. 2d 311, 295 P. 2d 46 (1956).

The California Supreme Court in this case explicitly disavowed decision herein upon State grounds: "We expressly refrain from any decision upon plaintiff's [respondent's] contention that neither the California Constitution nor any statutory provision provides a basis for the instant tax." 51 Adv. Cal. at 31, 363 P. 2d at 44, Appendix A at 46.

STATEMENT OF THE CASE

The Facts

This case was tried upon the pleadings only, petitioners having demurred generally to respondent airline's Second Amended Complaint for Refund of Taxes (R., Cl. Tr. 1-8)[3], as further amended by Stipulation and Order Re Amendment by Deletion of [sic] Second Amended Complaint for Refund of Taxes (R., Cl. Tr. 11-12).

Respondent airlines corporation "is the United States representative of Scandinavian Airlines System, a Consortium organization composed of three foreign air carriers: Danish Airlines, Norwegian Airlines and Swedish Airlines" (R., Cl. Tr., 2). For purposes

[3]The record herein has not been printed. It is very brief, though, and consists only of the transcript of proceedings in the California Superior Court (the trial court) and the modified opinion of the California Supreme Court. Said transcript contains the Amended Complaint, general demurrer thereto, stipulation for judgment and judgment. Thus, the facts herein are to be gleaned from said amended complaint or from the California Supreme Court's modified opinion, or from both. Reference to the record herein will be exclusively to the said Clerk's Transcript and such reference will be noted by the designation "R., Cl. Tr."

of simplification, respondent has been treated throughout this litigation by the courts (56 Adv. Cal. at 6, fn. 1, 363 P. 2d at 27, fn. 1, Appendix A at 3, fn. 1) and by the parties hereto as having precisely the same legal status as the owners of the subject aircraft. The taxed airplanes are owned by nationals of either Denmark, Norway or Sweden and each plane has its home base in one of those countries.

In November, 1954, respondent commenced a passenger air service between Los Angeles International Airport (located within the geographic boundaries of each of petitioners) and Copenhagen, Denmark. Respondent's "planes stop enroute to Canada, but touch the United States only at Los Angeles International Airport" (56 Adv. Cal. at 6, 363 P. 2d at 27, App. A at 4). Each week respondent's planes made two trips to Los Angeles. One plane would arrive in Los Angeles in the early afternoon on Tuesday and depart a day and one half later on early Thursday morning, and another plane would arrive during early Saturday afternoon and would depart Los Angeles early on the following Monday morning. An apportioned property tax assessment of said planes was made in March, 1955 by taking the average value of the thirteen aircraft making the flights, multiplying such amount by the fraction of the year that respondent had a plane in Los Angeles, and then multiplying said product by the ratio of assessed value to market value extant within Los Angeles. Said

assessment was then multiplied by the tax rate to obtain the amount of the tax ($11,240.46) levied against respondent whose planes had an average value of $12,341,000 and spent 0.4077 plane-years in Los Angeles in 1955. (R., Cl. Tr., 3-4).

During the period for which the tax was levied "The operations of all three airlines were taxed on an unapportioned basis by their respective home country [sic] for the period material to this complaint, and in Norway a property tax was levied on the entire value of the aircraft referred to above which were registered in Oslo as home port." (R., Cl. Tr., 3.)

REASONS FOR GRANTING THE WRIT

1. Summary of Argument

Braniff Airways v. Nebraska State Board, 347 U.S. 500, 98 L. Ed. 967 (1954), this Court held that the States may, consistently with the Commerce Clause and the Due Process Clause of the Fourteenth Amendment, *United States Constitution,* levy ad valorem property taxes upon aircraft making regular, recurring stops therein in interstate commerce even though said aircraft were owned by non-domiciliaries and based in other States, where said taxes are apportioned to reflect the benefits, protections or opportunities afforded such aircraft by the taxing States. The facts of this case are similar to those in *Braniff* except that here the aircraft are owned by foreign nationals and are for-

eign based, rather than being domestically owned and based, and they fly in foreign rather than in interstate commerce. In the case at bar the California Supreme Court, relying principally upon the decision of this Court in *Hays v. Pacific Mail S.S. Co.*, 17 How. (58 U.S.) 596, 15 L. Ed. 254 (1855), held that aircraft engaged in foreign commerce are taxable only at the home port or the domicile of the owners thereof. The California Supreme Court is of the opinion that the *Hays* case stands for the proposition that when vehicles of commerce enter upon international waters, or otherwise upon the international domain, they become taxable only at the domicile of the owners or the home base, and that the *Hays* case therefore compels said holding in this case now at bar.

This case is of considerable importance nationally. It will become increasingly important as the volume of international air traffic with the United States is handled more and more by foreign air carriers and as the instrumentalities thereof become more valuable.[4]

[4]Mr. Stuart S. Tipton, President Air Transport Association of America says in his recent article "A State of the Industry and Progress Report," Vol. 74 Aviation News No. 18 (May 1, 1961) 71: "The relative position of the U.S. Flag airlines in the air travel market between the U.S. and foreign countries deteriorated sharply in 1960. Although the market consists primarily of U.S. citizens—more than 6 out of every 10—the U.S. airlines share of the market dropped to 51.8 per cent. It had been 56.7 per cent the previous year.

"Foreign air carriers, who in 1950 carried about 25 per cent of this traffic, thus increased their share in 1960 to 48.2 per cent. If this trend continues—and there are no signs that it will be interrupted—1961 will gain the ominous distinction of being the year that the United States surrendered the lead to foreign airlines in the carriage of U.S. international air traffic.

"The growth and development of the entire U.S. certificated air carrier system is affected by this development. Under U.S. negotiating policies over

All of the States of the United States including the District of Columbia, except Delaware, Hawaii, New York and Pennsylvania, levy an ad valorem tax on tangible personal property. *State Tax Guide*, Prentice-Hall (1960) at 204. Foreign air carriers land upon airfields of the several states just as do the domestic carriers. Foreign air carriers use the facilities of, and within, the several States, just as do the United States domestic carriers. The foreign carriers derive the same benefits, opportunities and protections from the States into which they venture as do United States carriers.

Almost everyone would agree that multiple taxation of instrumentalities of international commerce is undesirable. But it does not follow that relief from such multiple international taxation should be accomplished by artificially refined construction and interpretation of the Commerce Clause, *United States Constitution*. Accommodation among nations in this respect should be effected by treaty. The Courts, because of the very nature of the governmental powers with which they

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the years, not only have more foreign airlines been added in this market but more and more have been given rights to penetrate the domestic U.S. field.

"One foreign airline operating from the U.S. west coast to Europe, for example, diverts more than $3 million annually from U.S. transcontinental airlines—an amount greater than the entire net profit of the domestic trunklines in 1960.

"Meanwhile, U.S.-Flag airlines are facing new developments abroad. Airlines of foreign countries, primarily in Europe, are banding together in pools and combines—dividing services and revenues on specific routes. In some cases air protectionism is becoming evident with some nations party to a pool or combine tending toward restriction of U.S. airline operations.

"To avoid a repeat of the deterioration of our merchant marine—the United States Government quickly and intelligently must reappraise its policies in this critical area." (pp. 78-79)

are vested, are particularly incompetent to resolve conflicts in international taxation. Not only do they not have the power to make positive law, but also they lack control over both of the governments causing the taxing conflict.

It would seem, too, with respect to aircraft owned by citizens of the United States, based in one of the States and flying exclusively in foreign commerce, that the home port State could not tax domestic planes at full value because practical account must be taken of the power of foreign nations to tax United States planes which there land. In *Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 232, cert. denied 359 U.S. 1001, 3 L. Ed. 2d 1031 (1958), the California Supreme Court held, in recognition of the fact that foreign nations could tax aircraft based in California and engaged in foreign commerce, that California could tax such planes only at such fraction of their value as equalled the proportion of their time spent in California. Now, however, in precisely the converse situation the California Court holds, that under the federal Constitution the States may not tax foreign owned and based aircraft and that such property is taxable only by the home port. It would seem that in any judicial resolution of the problems of international taxation recognition must be accorded the fact that foreign nations do have the sovereign power to tax United States aircraft making contacts there

with and flying in international commerce. If the States should tax at full value American planes based in the United States and flying in international commerce, said planes will then be subjected to the possibility of multiple taxation. It would seem only proper then for the Courts to recognize the power of the States within the limits established by orthodox Constitutional interpretation to tax foreign owned and based aircraft flying into the United States. The policy of this Court underlying its decision in *Burnett v. Brooks*, 288 U.S. 378, 77 L. Ed. 845, that problems of international multiple taxation should be resolved by Congressional act or treaty rather than by Constitutional construction, should be followed in this case. The Constitution has been intended to span the generations and therefore should not be interpreted so as to freeze its meaning to conform to and be compatible with the current tax practices of foreign nations. (Who would doubt that the tax herein would have been held valid by the California Court if the tax practice throughout other parts of the world were apportioned taxation?)

To reach its result herein the California Court put aside orthodox and established principles of Constitutional law. It had to cull from *Hays v. Pacific Mail S.S. Co.*, 17 How. (U.S.) 596, 15 L. Ed. 254 (1855), the entirely new doctrine that when instrumentalities of commerce enter the international domain they become taxable only by the home port or domicile of the owner.

The California Supreme Court also decided, contrary to past decisions of this Court, that ad valorem property taxation by a State of property which has *situs* therein is prohibited by the Duty of Tonnage Clause. *State Tonnage Tax Cases*, 12 Wall. (79 U.S.) 204, 213-214, 20 L. Ed. 370, 373 (1871); *Transportation Co. v. Wheeling*, 99 U.S. 273, 283, 25 L. Ed. 412, 415 (1879). Also, by a process of strained construction the California Supreme Court held the instant tax to be prohibited by the *Convention and Protocol between the United States of America and Sweden* (54 Stat. 1759, T.S. No. 958, Appendix C herein) even though said treaty by its very terms does not apply to State property taxation.

We submit that the tax administrators of other States will not be justified in following the decision herein of the California Court as authoritative upon the Constitutional issue involved because the opinion supporting said decision is based upon a series of premises many of which are contrary to principles of Constitutional law heretofore propounded by this Court. In *Chicago v. Willett Company*, 344 U.S. 574, 97 L. Ed. 559 (1953), a case wherein the Illinois Supreme Court held invalid under the Commerce Clause an ordinance of the City of Chicago laying a tax upon trucks transporting goods within said city for hire, this Court "granted certiorari to review this judgment [of the Illinois Court] because it raises questions of importance to the Nation's major transportation centers."

344 U.S. at 576, 97 L. Ed. at 563. We submit that the instant case raises "questions of importance to the Nation's major transportation centers" comparable to those raised in *Chicago v. Willett Company* and is therefore deserving of consideration and decision by this Court.

2. The Commerce Clause Does Not Prohibit the Subject Tax Because (1) It Is Not Discriminatory, (2) It Does Not Constitute a Direct Burden on Foreign Commerce, and (3) It Does Not Constitute the Basis for Taxation Constituting "Multiple Burdens" Upon Foreign Commerce.

None of the limitations upon the States' taxing power by this Court inferred over the years from the Commerce Clause has been exceeded by the instant tax.

In analysis of Commerce Clause limitations upon State taxing power it is not necessary to depend upon the distinction between permitted and prohibited State police power regulation of commerce discussed in *Cooley v. Board of Wardens of Philadelphia,* 12 How. (53 U.S.) 298, 13 L. Ed. 996 (1851). This Court has frequently said that "not every law that affects commerce among the States is a regulation of it in a constitutional sense" (*Galveston, H. & S. A. R. Co. v. Texas,* 210 U.S. 217, 225, 52 L. Ed. 1031, 1036 (1908); *Chicago v. Willett Company,* 344 U.S. 574, 576, 97 L. Ed. 559, 563), and that even though vehicles of inter-

state and foreign commerce are subject to exclusive regulation by Congress "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction" *Pullman's Palace Car. Co. v. Commonwealth of Pennsylvania*, 141 U.S. 18, 23, 35 L. Ed. 613, 616 (1891); see also, *Western Union Telegraph Company v. Taggart*, 163 U.S. 1, 14, 41 L. Ed. 49, 54 (1896); *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 695-696, 39 L. Ed. 311, 315 (1895); *Passenger Cases*, 7 How. (48 U.S.) 282, 402, 12 L. Ed. 702, 752 (1849); *Old Dominion S. S. Co. v. Virginia*, 198 U.S. 299, 305, 49 L. Ed. 1059, 1062 (1905). Thus, ad valorem property taxation of instrumentalities of commerce, foreign or interstate, is not in itself inconsistent with the prohibitions of the Commerce Clause.

This Court has often said that only certain types of State taxes are forbidden by the Commerce Clause: (1) Discriminatory taxes are proscribed. *Best and Co. v. Maxwell*, 311 U.S. 454, 85 L. Ed. 275 (1940); *Nippert v. City of Richmond*, 327 U.S. 416, 425, 90 L. Ed. 760, 765 (1946); *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, 1 L. Ed. 2d 1420 (1957); *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 3 L. Ed. 2d 421, 427 (1959); *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 395, 96 L. Ed. 436, 441 (1952). (2) State taxes constituting a *direct burden* upon com-

merce are prohibited. "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation of business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State." *Postal Telegraph Cable Co. v. Adams,* 155 U.S. 688, 695-696, 39 L. Ed. 311, 315. "Because the greater or more threatening burden of a *direct tax* on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been . . . carefully scrutinized . . ." *Freeman v. Hewit,* 329 U.S. 249, 253, 91 L. Ed. 265, 272 (1946). (3) State taxes upon the instrumentalities of commerce cannot impose the possibility of multiple burdens thereon. That is, State taxes cannot be such "that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 255-256, 83 L. Ed. 823, 828 (1937).

It is quite obvious that the instant ad valorem property tax, apportioned to reflect the fraction of the year the planes were in Los Angeles County, does not exceed the limitations of any of the foregoing tests and that therefore the instant tax is valid so far as the Commerce Clause is concerned. "Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states." *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166, 98 L. Ed. 583, 591 (1953).

As above-noted the California Supreme Court inferred from *Hays v. Pacific Mail S. S. Co.*, 17 How. (58 U.S.) 596, that when a vehicle of commerce enters upon international waters, or otherwise into the international domain, it becomes for that reason taxable only at its home port or at the domicile of its owner. (56 Adv. Cal. at 11-12, 363 P. 2d at 30-31, Appendix A at 11-14.) In *Hays* this Court held that a non-home-port, non-domiciliary state into which an ocean going vessel happened in the course of its trading and commercial operations could not levy an unapportioned tax thereon because the vessel did not acquire *situs* for taxation in the several ports into which it entered. The decision in *Hays* was rendered before this Court had adopted the principles of apportioned taxation and when the idea was held by this Court, and otherwise

almost universally entertained, that migrating personal property could have only one *situs* for taxation—either the place where permanently located or, in the absence of permanent location, at the domicile of the owner. "It is plain that the court had no notion that the ships were exempt from taxation because used as instruments of interstate commerce. It was recognized that they were taxable where they had their *situs*. The basis of the decision must therefore be that temporary presence is not enough to establish a *situs* for property away from its owner's domicile. Insofar as the court hints at practical reasons, it points to the possibility of multiple taxation if temporary presence is enough to confer jurisdiction. It contents itself with this, without going on to mention that such multiple taxation would interfere with the course of interstate trade . . ." Thomas Reed Powell, *Taxation of Things in Transit*, 7 Virginia Law Review 167, at 170 (1920). In his "Jurisdiction to Tax," 32 Harvard Law Review 587 (1919) Professor Joseph H. Beale explained the defect of the *Hays* tax:

> ". . . .The tax is levied for a year's protection: it is known that this particular chattel will require protection only for a short time. To exact a tax based on a year's protection would be unfair: no other tax is provided for by the law. If there were provision for a daily tax this could lawfully be exacted even from property temporarily within the state, for such property is of course within the jurisdiction of the sovereign. Any method pro-

vided by statute for exacting a really fair tax from such property is constitutional." 7 *Virginia Law Review* at 598.

This Court in *Braniff Airways v. Nebraska State Board*, 347 U.S. 500, 98 L. Ed. 967 (1954) also intimated that the vice of the *Hays* tax was that it was not apportioned by the non-domiciliary taxing state according to the benefits, protections and opportunities afforded the taxed property: "The first two cases [*Hays v. Pacific Mail S. S. Co., supra,* and *Morgan v. Parham,* 16 Wall. (83 U.S.) 471, 21 L. Ed. 303 (1873)] were efforts to tax the entire value of the ships as other local property, without apportionment, when they were used to plow the open seas." 347 U.S. at 600, 98 L. Ed. at 977.

Neither this Court in its decisions nor any of the learned Constitutional commentators have ever asserted that instrumentalities of commerce which enter the international domain are simply for that reason alone subject to rules of taxation entirely different from those applicable to vehicles of commerce which remain entirely within the United States. No one seems to doubt today that if a non-domiciliary state imposed an ad valorem tax upon instruments of interstate commerce apportioned according to the benefits, opportunities and protections afforded the taxed property that such tax would be held valid even though the instrumentalities ventured into the international domain.

Braniff Airways v. Nebraska State Board, 347 U.S. at 600, 98 L. Ed. at 977; Beale, *Jurisdiction to Tax*, 32 Harvard Law Review at 598. Therefore, this Court's decision in *Hays* depended upon its then existing concept of *situs*—that migrating property had only one *situs* for taxation—and not upon an unspoken theory of entry into international waters as urged by the California Supreme Court.

The California Supreme Court was obviously disturbed by the fact that the Scandinavian nations could tax their domiciliaries with respect to the subject aircraft, that such tax could be measured by the full value of the aircraft, and that any taxation by one of the several States might cause a cumulative tax burden upon foreign commerce: "When such a vehicle becomes an instrument of communication with foreign nations it is apparent that the apportioned basis of taxation is unworkable because the courts of this country can exercise no control over the foreign taxing authorities," 56 Adv. Cal. at 22, 363 P. 2d at 38, Appendix A at 30. We respectfully submit that the California Supreme Court is improperly attempting to achieve a delicate and refined adjustment of the law of international taxation by a strained construction of general principles of federal Constitutional law and by construing provisions of our Constitution in such manner as to accommodate the current tax practices of other nations. We believe that the tax power of the States should be accommodated to the tax power of foreign nations, and

vice versa, but that such accommodation should be accomplished by Congress or by the President and Senate through exercise of the treaty making powers.

It is true that the Scandinavian nations may tax these aircraft on the basis of their full value. Such power of taxation in the Scandinavian countries is not based upon any rule of *situs* as pronounced in *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, but rather upon the power of nations to tax their citizens on account of property owned thereby, wherever located, and independent of whether or not the taxing nation provides any direct benefits, opportunities or protections to the property so taxed. *United States v. Bennett*, 232 U.S. 299, 58 L. Ed. 612 (1914); Page, *Jurisdiction to Tax Tangible Movables*, 1945 Wisconsin Law Review 125, 138-140. In exercising their national taxing powers the Scandinavian nations may not feel constrained by such principles and limitations as underlie our federal Commerce and Due Process Clauses. However, the current tax practices of foreign nations should not govern or influence the interpretation of our federal Constitution as they apparently have the California Supreme Court in this case. That Constitutional interpretation and construction should be independent of the taxing practices of others was the view of the late Chief Justice Stone. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 88 L. Ed. 1283 (1944) (dissenting opinion): "The extent to which one state may constitutionally tax the instruments of interstate trans-

portation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do." 322 U.S. at 326, 88 L. Ed. at 1303. And in *Coe v. Errol,* 116 U.S. 517, 29 L. Ed. 715 (1886), this Court said "If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary." 116 U.S. at 524, 29 L. Ed. at 718. See also *Freeman v. Hewit,* 329 U.S. 249, 91 L. Ed. 265: "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." 329 U.S. at 256, 91 L. Ed. at 274. In *Burnett v. Brooks,* 288 U.S. 378, 77 L. Ed. 845 (1933), this Court held valid under the Due Process Clause of the Fifth Amendment a federal tax on intangibles located within this country, but owned by an English citizen who had died domiciled in Cuba. In commenting upon this case Professor Charles L. B. Lowndes, "Spurious Conceptions of the Constitutional Law of Taxation," 47 Harvard Law Review 628 (1934) states:

> "There is a valid distinction from a practical point of view between multiple state taxation and

multiple international taxation. It is possible to sponsor a coherent system of restrictions upon double taxation when you control all the claimants who are competing for the tax. Interstate mutiple taxation can be regulated by the Supreme Court because it controls all the factors in the problem. On the other hand, in the contest over international taxation, the Supreme Court is an inadequate arbiter since it can coerce the action of only one of the principals to the controversy—the United States. If, in a given situation, the Court denies the nation the power to tax, there is no assurance that foreign governments will reciprocate. The result would be that this country would be forced to abnegate a source of revenue without any adequate assurance of a corresponding benefit from other governments. In interstate multiple taxation the competing considerations are the state's claim to be immune from undue economic and administrative vexation. In international multiple taxation the nation's need for revenue is balanced against the hardship upon the alien who is subjected to a tax by this country and his own. The severity of his burden may be mitigated by treaty or the benevolence of his own government. At any rate, the Supreme Court will have no part of it. International double taxation is a matter for legislative or executive action rather than judicial action, and this is the substantial result of *Barnett v. Brooks.*" 47 Harvard Law Review at 634-635.

It seems also to have been the consensus of many law commentators that problems of international

double taxation should be alleviated and resolved by treaty rather than by construction and interpretation of the constitution. *Note*: *Multiple Taxation*: *The Implications of Burnett v. Brooks*, 47 Harvard Law Review 307 (1933); *Note*: *Taxation—Inheritance Taxes—Power of a State to Tax Intangible Property Owned by One Domiciled in a Foreign Country*, 84 Univ. Penn. Law Review 794-795 (1936); *Note*, *Validity of Federal Estate Tax on Securities Owned By Non-Resident Alien*, 42 Yale Law Journal 1277-1279 (1933).

3. The Instant Tax Does Not Constitute a Duty of Tonnage Because It Is An Ad Valorem Tax Apportioned According to the Benefits, Opportunities and Protections Afforded the Respondent's Aircraft.

A ground asserted by the California Court as basis for invalidity of the subject tax is violation of the Duty of Tonnage Clause. The majority of the California Court states that a Duty of Tonnage as proscribed by the federal Constitution is "a duty levied as a condition to being allowed to enter or leave port; such a duty represents an interference with commerce; and, no state is at liberty to interfere with foreign commerce . . . There is no logical reason why the stated principles should apply only if the proposed tax is based upon the gross tonnage of a vessel and be inapplicable if the same tax is based upon the vessel's value." 56 Adv. Cal. at 24-25, 363 P. 2d at 39-40. Ap-

pendix A at 34-35. Thus the California Court ignores the cases of this Court and holds that an ad valorem property tax is proscribed by the Tonnage Clause. That the instant tax is a permitted ad valorem property tax and not a Duty of Tonnage clearly appears from opinions of this Court: "Taxes levied by a State upon ships and vessels owned by the citizens of the State *as property, based on a valuation of the same as property*, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any *duty of tonnage*, without the consent of Congress." (emphasis added) *State Tonnage Tax Cases*, 12 Wall. (79 U.S.) 204, 213-214, 20 L. Ed. 370, 373 (1871). See also *Transportation Co. v. Wheeling*, 99 U.S. 273, 283, 25 L. Ed. 412, 415 (1879).

4. No Treaty to Which the United States Is a Party Exempts the Subject Airplanes from State Taxation.

The California Court as a ground for holding the subject tax invalid states that the treaty between the United States and Sweden forbids such tax: "In our opinion, the language of the various treaties and agreements clearly eliminates the possibility of local property taxation only insofar as concerns those airplanes owned and registered in Sweden" (56 A.C. at 30, 363

P. 2d at 43, App. A at 43-44). The Swedish-American treaty relied upon as exempting airplanes of Swedish domiciliaries from taxation is the "*Convention and Protocol Between the United States of America and Sweden*" respecting double taxation effective January 1, 1940. 54 Stat. 1759, U.S. Treaty Series No. 958, Appendix C. Article I of said treaty recites:

> "The taxes referred to in this Convention are:
>
> "(a) In the case of the United States of America:
>
> "(1) The Federal income taxes, including surtaxes and excess-profits taxes.
>
> "(2) The Federal capital stock tax.
>
> "(b) In the case of Sweden:
>
> "(1) The National income and property tax, including surtax.
>
> "(2) The National special property tax.
>
> "(3) The communal income tax.
>
> "It is mutually agreed that the present Convention shall also apply to any other or additional taxes imposed by either contracting State, subsequent to the date of signature of this Convention, upon substantially the same bases as the taxes enumerated herein."

It is plain from the above that the treaty does not apply to State property taxation. But the California Court then refers to Article XIII, subdiv. (2) of said treaty for support of its conclusion that said treaty

renders respondent's Swedish planes immune from the subject tax:

> "In the case of all other forms of property, the tax may be levied only in that contracting state where the taxpayer has his residence or, in the case of a corporation or other entity, in the contracting State where the corporation or other entity has been created or organized."

In concluding that said Swedish treaty exempts plaintiff from the subject tax as applied to Swedish owned planes the California Court does violence to the precise, explicit language of Art. I of the treaty providing that it applies only to the Swedish "National special property tax" (Art. I) and such "other or additional taxes imposed by either contracting State, subsequent to the date of signature of this Convention, upon substantially the same bases as the taxes enumerated herein" — which, of course, would include any property taxes thereafter imposed by the United States or the States.

Where said treaty refers in Art. XIII, subdiv. 2, to property taxes it must refer to the Swedish "National special property tax" and such other property taxes enacted by Sweden or the United States after the date of the signature of said convention. Such construction of said treaty as we here suggest does not do violence to any portion of the language of the treaty as does the interpretation by the majority of the Cali-

fornia Supreme Court. Further, our interpretation is consistent with the position taken by the Senate Foreign Relations Committee when urging ratification of said United States treaty with Sweden: "[T]he United States makes no agreement respecting any of our State or local taxes" (Report of the Senate Foreign Relations Comm., Exec. K, 76th Congress, 1st Session (1939). Statements by legislative committees are material facts to be considered in interpreting their works if such are ambiguous. *American Stevedores v. Porello*, 330 U.S. 446, 452-453, 91 L. Ed. 1011, 1017-1018 (1947): *Caminetti v. United States*, 242 U.S. 470, 490, 61 L. Ed. 442, 455 (1917).

The California Supreme Court further holds that the Swedish-American treaty (which it asserts exempts Swedish planes from the instant tax), because of the juxtaposition of the federal Commerce Clause, also causes the exemption of the Danish and Norwegian planes from the instant tax. The California Court says that for California to tax Danish and Norwegian planes when the Swedish planes are exempt from taxation by treaty would be for California to discriminate with respect to foreign commerce—which is forbidden by the Commerce Clause. Such, of course, is an erroneous argument. The Commerce Clause does not guarantee equal treatment of instruments of commerce in all cases. It merely forbids discriminatory treatment *by the States*. The applicable California laws apply equally to the planes of all legal entities in respondent air-

line's position. If unequal treatment is afforded Danish and Norwegian citizens because of the taxation of their aircraft and the exemption of Swedish aircraft, such discrimiantion has been wrought only by federal Treaty. The California Court's argument can easily be disproved by refernece to the more familiar field of interstate commerce. If in the exercise of its commercial power the federal Congress chos to exempt one type of property moving in interstate Commerce from State taxation, certainly the argument would not be valid that all other property moving in interstate commerce is therefore and thereby exempt from all State taxation. Such invalid conclusion, however, is the necessary consequence of the position of the California Court.

5. The Instant Tax Does Not Exceed the Limitations Imposed Upon the States by Due Process Clause, Fourteenth Amendment, United States Constitution.

Respondent airline has urged herein that the instant tax offends the requirements of Due Process, Fourteenth Amendment, U.S. Constitution (R., Cl. Tr., 6). The airline's argument has been principally that the possibility of multiple taxation is forbidden by Due Process, Fourteenth Amendment, as well as by the Commerce Clause, and that, because the domiciliary nations possess the power to tax the subject aircraft

at full value, any taxation by the States would submit said aircraft to the possibility of multiple taxation. See opinion herein of the California District Court of Appeal, 6 Cal. Rptr. at 696, Appendix B at 3. This Court has said that "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State." *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174, 93 L. Ed. 585, 589 (1949). Also to the same effect are *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 85 L. Ed. 267 (1940); *Braniff Airways v. Nebraska State Board*, 347 U.S. 590, 600, 98 L. Ed. 967, 977. And, as already noted hereinabove the tax practices of another jurisdiction are immaterial in determining the power of a State to tax under limitations of the Due Process and Commerce Clauses. *Freeman v. Hewit*, 329 U.S. 249, 256, 91 L. Ed. 265, 274; *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 326, 88 L. Ed. 1283, 1303; *Coe v. Errol*, 116 U.S. 517, 524, 29 L. Ed. 715, 717-718. Thus it would seem that the instant tax apportioned according to the time respondent's planes are within Los Angeles County clearly conforms to requirements of Due Process, Fourteenth Amendment.

CONCLUSION

For the reasons above-stated it is respectfully submitted that the judgment of the California Supreme Court should be reversed.

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